U.S. Department of Labor

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MAILED: 12/07/2000

IN THE MATTER OF:	*	
	*	
Scott D. Campbell	*	
Claimant	*	
	*	
Against	*	Case No.: 1999-LHC-2918
	*	
Bath Iron Works Corporation	*	OWCP No.: 1-136820
Employer/Self-Insurer	*	

APPEARANCES:

James W. Case, Esq.
For the Claimant

Joseph M. Hochadel, Esq.
Carol G. McMannus, Esq.
For the Employer/Self-Insurer

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on April 18, 2000 in Portland, Maine, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 19A	Attorney Case's letter filing the	06/21/00
CX 20	May 20, 2000 Deposition Testimony of Peter Duchesneau	06/21/00
CX 21	Attorney Case's letter requesting a short extension of time for the parties to submit their post-hearing briefs	07/17/00
ALJ EX 6	This Court's **ORDER** granting such request	07/17/00
CX 22	Claimant's brief	08/04/00
CX 23	**Decision and Order Awarding Benefits** issued by District Chief Judge Robert D. Kaplan on April 6, 1999 in **Maurice A. Polk v. Bath Iron Works Corporation**, 1998-LHC-0197, OWCP No. 1-123201	08/04/00
EX 11	Employer's brief	08/04/00
CX 24	Attorney Case's fee petition	08/04/00
EX 12	Employer's comments thereon	08/09/00
CX 25	Attorney Case's response thereto	08/16/00

The record was closed on August 16, 2000 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On April 10, 1996, Claimant suffered an injury in the course and scope of his maritime employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. The claim for compensation is dated June 5, 1996 and the Employer's notices of controversion are dated April 11, 1996 and November 13, 1997.

6. The parties attended an informal conference on July 22, 1999.

7. The applicable average weekly wage is $746.87.

8. The Employer voluntarily and without an award has paid temporary total and partial compensation from April 10, 1996 through the present for various time periods and at various rates.

The unresolved issues in this proceeding are:

1. Whether Claimant's alleged psychological problems are causally related to his work-related injury and his maritime employment.

2. If so, the nature and extent of Claimant's disability.

3. Whether the Employer has established the availability of suitable alternate employment for Claimant at the Employer's shipyard.

Summary of the Evidence

Scott D. Campbell ("Claimant" herein), forty-three (43) years of age, began working on February 10, 1980 as an outside machinist at the Bath, Maine shipyard of the Bath Iron Works Corporation ("Employer"), a maritime facility adjacent to the

navigable waters of the Kennebec River where the Employer builds, repairs and overhauls vessels. As an outside machinist Claimant was responsible for setting up, installing and testing the operating systems on the vessel and, in the performance of his assigned duties, he was involved, **inter alia**, in testing switches, governors, machinery and other components, all of which tasks included going out on the vessel's so-called "sea trials" to test the integrity of the systems and components of the vessel. He also helped in the training of U.S. Navy personnel in the operation of the various systems. He has worked all over the vessels and he daily had to carry his equipment, material and supplies to his work site, Claimant remarking that he often worked in tight and confined spaces. The ships are multi-level structures and he had to climb up/down several levels of ladders/stairs to gain access to his work site. (TR 26-29; CX 14)

On April 10, 1996 Claimant was working on the hull of the 460 Boat and, as it had snowed during the night and as he was leaving the platform, he slipped and fell three (3) to four (4) feet to the landing below him, Claimant falling "on (his) bottom." (CX 18 at 242) He experienced the onset of "excruciating pain" and an ambulance took him to the Mid-Coast Hospital Emergency Room where x-rays showed a compression fracture of the twelfth cervical and first lumbar disc. Dr. Sandick prescribed Toradol, Demerol and Vistoril, and she told Claimant to follow up with Dr. Van Arden or Dr. Trick and kept Claimant out of work for three weeks. (CX 8; TR 30-32)

On April 17, 1996 Claimant went to see Dr. Mats Agren, an orthopedic physician, and the doctor, after the usual social and employment history, his review of diagnostic tests and the physical examination, ordered a bone scan because of the continuing lumbar pain. (CX 1 at 1-4) The April 23, 1996 Bone Scan at the Maine Medical Center confirmed the compression fracture at T-12 and the doctor recommended additional evaluation. (CX 1 at 5) As of May 9, 1996 the doctor released Claimant to return to work with restrictions on light duty for at least three or four months. (CX 1 at 7)

Claimant returned to work on May 25, 1996 at his regular job and his immediate supervisor told him to go ahead and perform his assigned duties but to stay within his restrictions. Claimant's lumbar pain continued and his "very physical" work increased his pain syndrome. Moreover, the lumbar pain caused

him to lose sleep, resulting in emotional and financial problems as he was unable to volunteer for the overtime that he formerly worked as a member of the operating crew. He had to ask his co-workers for assistance with heavier items he had to lift and carry, thereby aggravating his depression. He experiences daily back pain and just about any activity exacerbates his lumbar disc pain syndrome. Prolonged standing, sitting and walking aggravate his chronic pain and he has been treated and evaluated by a number of physicians. (TR 35-37)

Dr. Douglas Pavlak, who has seen Claimant between October 27, 1997 and March 22, 2000 (CX 10) and who is a specialist in physical medicine and rehabilitation, recommended "a repeat thoracolumbar spine series" to evaluate Claimant's continued lumbar pain (CX 10 at 89), the doctor remarking that the pain could be "due to the heavy nature of his work." (**Id.**) Dr. Pavlak continued the work restrictions. (CX 10 at 90) As of December 4, 1997 the doctor prescribed a program of flexion/extension exercises. (CX 10 at 92)

As of January 21, 1998 Dr. Pavlak sent the following letter to Dr. Todd A. Tritch (CX 10 at 93):

I saw Scott in follow-up today. He had been doing quite well, but did have a recent exacerbation of pain due to working in an awkward position for an extended period of time at BIW at holiday shutdown. He recovered from this, however, he is being a little bit more careful with his back. He generally has tolerable pain and is careful with what he does.

Physical examination was not repeated in detail.

In conclusion, Scott continues to be symptomatic but managing well. It is likely that he will continue to have intermittent episodes from time to time, but hopefully he is learning how to minimize his risks by appropriate body biomechanics and not putting him into high risk positions.

He is doing well at this point in time, so I do not really see a need to see him back until about five or six months from now. If he is doing well, I will just see him on an annual or semi-annual basis as needed.

As of March 5, 1998 Dr. Pavlak sent the following letter to Linford J. Stillson, D.O. (CX 10 at 94-95):

I saw Scott Campbell in follow-up today. I have been following him somewhat intermittently for recurrent back pain post compression fracture.

Scott comes in today somewhat earlier than his anticipated visit because he has been having some recurrent pain. This has not been severe enough to take him out of work, but he has growing concerns about the fact that he does not feel his work place is assigning him job duties that are appropriate to the restrictions I have given him. He states that he has been put in positions where he has to go in the bilge of the ships and do jobs that require perhaps no more than 20 to 30 minutes, but that during this time he is continuously bent over. He states if he does a lot of this throughout the day that his back will bother him quite a bit and he will have difficulty doing anything by the time he gets home. He simply thinks that there is other work that would be better for him to do, and he does not understand why he is being given this work. He does agree that all of our documentation we provided him with seems to support the notion that he should be assigned to more appropriate spots, but he simply is concerned about this and is wondering what he should do.

Physical examination was not repeated in detail.

In conclusion, Scott continues to have recurrent low back pain. Obviously, this waxes and wanes, but it seems to be worsening lately simply because of the type of work he is being assigned to. I offered to firm up his restrictions somewhat and to allow him only minimal bending and twisting which would be only nine minutes of the hour according to the workman' compensation guidelines, but he would rather not go this route. I think at that point therefore the only option he has is a legal one and he should consult his attorney to perhaps write a letter to his supervisor suggesting to him that they should pay more attention to his restrictions. I would be happy to assist in any way. I did state for the record for Scott's benefit that it is clear that my restriction of 21 minutes out of the hour of bending and twisting does <u>not</u> mean continuous bending, since this would clearly be detrimental to him. He really should be in a position where he can move about more freely and bend and twist intermittently rather than on a continuous basis. I agree that to put him in a position like he has been will only be asking for trouble in the long run and for more absenteeism due to the recurrent back pain.

I otherwise look forward to seeing Scott back for his routine follow-up visit in the summer, according to Dr. Stillson.

As of March 20, 1998 Dr. Pavlak sent the following letter to Dr. Stillson (CX 10 at 96-97):

I saw Scott today in follow-up. Unfortunately since I last saw him, he comes back today complaining of increased pain. I had a very long and detailed discussion with Scott today about things that he never told me about in the past. He apparently has had a lot of difficulty with his back and really was trying to minimize his symptoms. Apparently he has had difficulty sleeping for many, many months if not since the time of the injury itself. He also states that he has difficulty doing even the lighter alternative duty jobs that they have had him doing. He states that whenever he is on his feet for a long period of time and doing a lot of bending and twisting that he gets a lot of discomfort, even if he does not do a lot of heavy weight lifting. Apparently he had been minimizing his symptoms to me when in fact he has actually been experiencing a lot more pain than he had been suggesting to me. He states that it is at the point where he is very stressed at home and has even had to go to counseling with his wife because of how much work takes out of him in terms of his pain and sheer level of exhaustion because of lack of sleep.

Physical examination was not repeated in detail.

In conclusion, Scott continues to by symptomatic. Unfortunately it appears as if he has really been holding back for a long period of time both to his physicians and to his work place about how much his back is really bothering him. I explained to him that it is important that he make it clear to his supervisors when his back is bothering him. He did ask me to be a little bit more specific on his work restrictions, and so I did give him more restrictive weight restrictions as well as the amount of bending and twisting at the waist that he should do. After reviewing this in detail, I simply explained to Scott that he should stick up for himself at work if there is an issue between his employer and him. I try to be as objective as possible in outlining what I think are reasonable and appropriate restrictions, and Scott will try to adhere to this. He also will be careful at home, since I think it as important that he adhere to restrictions at home as it is at work, according to the doctor.

Dr. Pavlak sent the following letter on June 3, 1998 to Dr. Stillson (CX 10 at 99):

I saw Scott in follow-up today. He generally feels about the same. He doesn't feel any better or any worse, but he does feel like he has to stay on his current restrictions. He still has fairly significant pain by the end of the week and he doesn't see this as going away. He states he can still function at his current job which has been changed somewhat but he is somewhat concerned about the long run. He did stop taking his nortriptyline because it did help him sleep but he didn't seem to have a decrease in his pain and he didn't like the way it made him feel.

Physical examination was not repeated in detail.

In conclusion, Scott continues to be symptomatic. After a very lengthy discussion about chronic pain and various issues, I suggested two things. The first was a trial of Paxil 10 to 20 mg p.o. q.d. to which Scott was in agreement. I also discussed the possibility of referral to our chronic pain psychologists in the Behavioral Medicine Interventions division of our practice. The folks at Behavioral Medicine Interventions have been extremely helpful because of their expertise in chronic pain management from a behavioral perspective with patients such as Scott and I told him that his might benefit him as well. He would give it some consideration but did not want to commit to an appointment at this point in time.

I will see him back at the end of the summer unless he has any problems in the interim. I continued his current work restrictions and he will let us know how he does on the Paxil. If he has any side effects, he did agree to try some other SRIs which I would prescribe over the phone in the interim.

As of June 25, 1998 Dr. Pavlak sent the following letter to Dr. Stillson (CX 10 at 103-104):

I saw Scott in follow-up today. He came in in somewhat of a crisis state. He has been very concerned about increasing dizzy spells, fatigue, and a feeling of exhaustion that he has been experiencing lately since I last saw him. He actually saw Dr. Callis in your office last week before starting Paxil as I prescribed because these complaints were ongoing even before he started the medication. She thought that he might have already been on the medication and thought that this might have been

contributing, and so she switched him to amitriptyline. His complaints have not changed, but he is very concerned that he is at the point where he might fall off a ladder at work and he doesn't feel safe at work. He doesn't feel that his back pain is any worse, but he does still have difficulty sleeping all night long as a result. He tosses and turns and he feels very exhausted at the end of a day's work even though he is on light duty restriction.

Physical examination today revealed normal range of motion of the thoracolumbar spine. Deep tendon reflexes were 2+/4 and symmetrical and there was no clonus. Motor testing revealed completely normal strength in the lower extremities. Tandem gait was completely normal.

In conclusion. Scott presents today with abrupt worsening of more systemic complaints of fatigue and neurologic complaints of dizziness and headache. While I explained to him that it is certainly quite possible that long term sleep deprivation and secondary depression as well as the stress that he may feel at work because of these symptoms might be leading to all of this, I certainly cannot rule out the possibly of nonrelated neurologic disease such as demyelinating disease, acoustic neuroma, etc. Because of this, I did contact your office and talk with Dr. Callis. She agreed that neurologic referral would be reasonable at this point in time and this was arranged with Dr. Bernard Vigna in Bath, with whom I discussed the case. I still think it is quite possible that all the symptoms may be related to Scott's back pain and his sleep deprivation and depression. I also ordered a chronic pain psychological evaluation at Behavioral Medicine Interventions in our office to do a depression scale analysis and full intake to determine if, in fact, Scott is having somatic complaints referable to his back injury. I still think it would be important, however, to make certain that there is no other neurologic diagnosis ongoing, and hence referral to Dr. Vigna. If, for any reason, something neurologic is found, then Scott knows that we have to pursue this as appropriate. An MRI scan may wind up having to be ordered as well.

In the interim, I did take him out of work on a temporary basis pending his neurologic evaluation and evaluation for depression. I suggested that he continue on his amitriptyline at 25 mg p.o. q.d. for the next week, increasing to 50 mg p.o. q.d. thereafter. Certainly, since he is not going to be on the job, he doesn't have to worry about falling off a ladder injuring

himself. I will see him back as soon as Dr. Vigna's workup is complete, and hopefully we can get Scott back on track and back to work effectively and safely.

Dr. Pavlak continued to see Claimant as needed to evaluate and treat his multiple medical problems (**see, e.g.,** CX 10 at 106-114) and the doctor sent the following letter on January 29 1999 to the Employer's workers' compensation adjuster (CX 10 at 115):

Thank you for your letter dated January 12, 1999, regarding Scott Campbell. I have taken this opportunity to review his chart and your job description. It would appear that the job description for a parking lot attendant two to three hours per day five days per week appears within Mr. Campbell's physical restrictions. However, as you know, I have had Mr. Campbell in an out-of-work status primarily because of his difficulty sleeping and inability to tolerate certain medications. I have tried to treat him for his pain and associated mild depression. While I do feel that he is physically capable of doing this job, I don't know whether he is emotionally capable of it at this point. As you probably can tell from my most recent notes, I have been trying to encourage Scott in every way to look at re-employment and to get himself back on the job, but I certainly cannot force him to do something against his will. I would suggest that you contact him with an offer for this job. I am comfortable saying without discussing with him that I think that it is within his physical capabilities such that it will not worsen any intrinsic spine disease that he has. However, he has been reticent to return to work because he is not sleeping and he does feel that this is upsetting his ability to tolerate pain and general activities. It could well be that he feels this way at the current time as well, according to the doctor.

As of March 9, 1999 Dr. Pavlak sent the following letter to Dr. Stillson (CX 10 at 116-117):

I saw Scott in follow-up today. Unfortunately, he had side effects from Zoloft and could not tolerate this. He generally has been feeling about the same with some disturbed sleep patterns and recurrent chronic back pain. He actually is still interested in trying yet one more medication if I think it will help him. He is also still interested in seeing Mr. Brainerd for a therapeutic exercise program, but, again, he is not certain if Workers' Compensation will cover this. He apparently

did go see Dr. Pier for a second opinion in Portland and it is not clear what the results of this will be. I also did discuss with Scott a letter I received from B.I.W. offering the potential for a part-time parking lot attendant job. I told him that I thought that this was within his physical restrictions, but it really depended on whether or not he felt that he could function at that level. He did not feel that he could work 40 hours a week in his old department given his sleep disturbance and mild depression and chronic pain, but he did feel willing to try the 10 to 15 hour per week parking lot attendant position if it would be offered to him.

Physical examination was not repeated in detail.

In conclusion, Scott is more or less the same and still has trouble tolerating medications. The only thing I can think of trying at this point in time would be one last SRI in the form of Celexa 20 mg p.o. q.d. for two weeks, to be increased to 20 mg p.o. q.d. thereafter. Hopefully this will help him with his sleep disturbance and mild depression and his chronic pain and will improve his function. I also still think strongly that he would benefit from a therapeutic aerobic exercise program and conditioning program as offered by Mr. Brainerd in our therapeutic division, but the word remains out on this as to whether or not it will be covered by Workers' Compensation.

From a work standpoint, it does appear that Scott is at least willing to try the part-time position offered, and so I will inform Bath Iron Works of this. For my part, I will see him back in two months' time for a clinical follow-up, according to the doctor.

With reference to that job as a parking lot attendant at the shipyard, Dr. Pavlak sent the following letter on March 9, 1999 to the Employer (CX 10 at 118):

This is in follow-up to my previous dictation of January 29, 1999. I had the opportunity to see Scott Campbell today for a follow-up visit, and he told me on that visit that he would be willing to try the parking lot attendant job if it is as described for two to three hours per day, five days per week. If it were offered to him he states that he would be willing to try this, and so I assume that this means that he feels that he is capable of doing this. This is simply information that I did not have available to me when I last dictated that letter. He would be cleared from my standpoint to do this type of work.

As of March 12, 1999 Dr. Pavlak sent the following letter to Claimant's attorney (CX 10 at 119):

Thank you for your letter dated February 23, 1999, regarding Scott Campbell. After review of his chart and your letter, let me answer your questions as follows:

1. With regard to whether or not Scott has reached the point of maximum medical improvement, I think that he has. By this I agree that he is at a point after which further significant improvement in his medical condition is not likely to be achieved. I am specifically referring to his diagnosis of him compression fracture of T12. I need to point out, also, that Mr. Campbell currently is experiencing some degree of mild depression and sleep deprivation due to his pain, but that this condition is more likely to have some improvement with medication use and passage of time. His compression fracture, however, likely will not change that much.

2. With regard to my assessment of permanency, I think that Mr. Campbell does have a permanent medical condition for which there is no specific cure. He is almost certain to have recurrent varying degrees of chronic recurrent low back pain as a result of his compression fracture.

3. With regard to my diagnosis, Mr. Campbell has recurrent back pain post compression fracture of T12 which was directly related to the traumatic injury he sustained at Bath Iron Works on April 10, 1996. He also has some mild depression and sleep deprivation because of his chronic pain currently, but this is something that I anticipate will slowly improve and will not likely be permanent, according to the doctor.

As of August 18, 1999 Dr. Pavlak sent the following letter to Dr. Stillson (CX 10 at 122):

I saw Scott in follow-up today. He is up to the maximum dose of Zanaflex, but it does not really seem to be doing much for him. He is working two hours a day as a parking lot attendant at Bath Iron Works and this is going fairly well. He continues to complain of chronic back pain which is unchanged.

Physical examination was not repeated in detail.

In conclusion, Scott continues to have chronic pain. Zanaflex does not appear to be doing much so I discontinued it. He will taper off from this slowly over the next week or two. Diagnostically, no further tests were ordered.

Therapeutically, I had a discussion with Scott. There is really not too much from a purely medical standpoint that I can add at this point in time. He has a lot of side effects with medications. The only thing that could conceivably give him some benefit on a p.r.n. basis that is not medication is the use of a TENS unit. This is usually an all or nothing type of response, and I suggested that he try one month rental trial with purchase of a TENS unit if effective. This is about the only thing I could think of on a realistic basis that would give him some additional benefit. I gave him a prescription to try this.

I otherwise will see him in six months' time. If he is not really that much different at that point, I will probably discharge him to p.r.n. since there will not be anything much more I can do for him, according to the doctor.

As of November 5, 1999 Dr. Pavlak sent the following letter to the Employer (CX 10 at 126-127):

Thank you for the letter dated November 4, 1999 regarding Mr. Campbell. I have reviewed his chart and I am able to answer your questions as follows.

1. With regard to why Mr. Campbell's ability to work has further diminished, part of this is a misunderstanding. You pointed out to me in your letter that prior to October 4, 1999 the patient did not have any limitations for the activities of climbing, walking, standing or sitting. This is actually incorrect, since the M-1 done by me on March 20, 1998 did limit standing, walking and sitting to occasionally, which is 21 minutes per hour. I believe that I did make an error on my October 4, 999 M-1 form. I basically tried to simply transcribe the most recent limitations I had placed on Scott, which were on March 20, 1998. In transcribing this, I made an error in checking off the never climb section. Nothing was checked on the March 20, 1998 M-1 form, and review of Scott's chart finds that I did release him on December 4, 1997 to occasional climbing, which again is 21 minutes out of each hour.

To correct that error, I think it is safe to assume that there was an error made by me simply in trying to rifle through the chart, find the most recent M-1 form, and accurately transcribe it. I think it would be probably reasonable to assume that Mr. Campbell does have an occasional climbing ability. With this one exception, therefore, then his work capacity has really not further diminished than it had been on the March 1998 M-1 form

2. With regard to the issue of allowing Scott to return to work only when I have approved the job description, I believe that this is a request of Mr. Campbell's attorney and Mr. Campbell himself. The letter from Mr. Case regarding Scott did suggest that I prepare the M-1, and, if I thought appropriate, make it conditional on my prior review of the specific job description with Scott. I do not do this for all patients, but it appears that there is some concern on Scott's part as to the appropriateness of his job. I do not believe that this is necessary in all cases. The only reason I suggested it in this case is that there has been a lot of medical legal undertones in this case compared to most, and I certainly do not want to set up another situation in which Scott will fail on a return to work trial simply because I approve a job that he may possibly have a problem doing. I would be happy to approve any job over the phone if Scott believes that he can do it after review of the job description. I simply wanted to make certain that I had at least some chance to review it first. Again, please understand this effort was made primarily to try to assure a successful return to work rather than to hinder it. In my experience these measures are only necessary when there are more medical legal issues involved in the case than when there are less ones, according to the doctor.

Dr. Pavlak sent the following letter on December 15, 1999 to Dr. Stillson (CX 10 at 128-129):

I saw Scott in follow-up today. This is specifically to go over with him a potential job that has been offered to him by BIW. This apparently is called label plate/H466 and involves the placing of different labels in different parts of the ships at BIW.[1] Scott told me that he is familiar with this job, and he has some concerns about the amount of standing, bending, and twisting that are involved. He thinks that he is capable of

[1]The Ergonomic Assessment Work Site Evaluation for that proposed job is in evidence as EX 7.

certain parts of the job, but he would be hesitant to start in at full time. He seems somewhat concerned on the one hand about wanting to do parts of the job, but he does share with me quite honestly that he is concerned about whether he can do all of it. In particular, he thinks that it might be smarter if he starts part time and waits a month to see if he can progress upward in hours because of his fears that the job might involve too much time on his feet. He states that there are apparently a large number of items of the job description that are not well objectified and he is somewhat familiar with the job and is not certain if the job analysis given to me really represents the entire job as accurately as it should.

Subjectively, with regard to his symptoms, he has been under reasonable control. He is still having difficulty sleeping, but he gets some relief from taking ibuprofen 800 mg p.o. t.i.d. as needed. His back pain itself is more or less unchanged.

Physical examination today was not repeated in detail.

In conclusion, Scott is doing about the same as far as his subjective complaints. I think that he probably can do the job described at BIW doing labels, but he is hesitant to start full time. I therefore suggest that he start at four hours per day and that the restrictions I pointed out to Bath Iron Works on October 4, 199, be adhered to. Scott will get back to me in after about a month to see if he thinks he can progress his hours. He is scheduled for a follow-up visit in February at which time I will address this more definitively, according to the doctor.

The last letter from Dr. Pavlak to Dr. Stillson in this closed record is dated March 22, 2000 and therein the doctor states as follows (CX 10 at 130):

I saw Scott in follow-up today. He generally feels the same. He has flare-ups that last anywhere from two hours to two days, but he otherwise has stable chronic low back pain. He continues to utilize ibuprofen p.r.n. and a TENS unit as needed.

Physical examination was not repeated in detail.

In conclusion. Scott is doing about the same. At this point in time, there is not much else for me to do for him. Unfortunately the job that he was entertaining that was being offered to him by BIW last time ultimately became unavailable

and so he once again is in the midst of awaiting a job within his restrictions. These remain fixed and there is not much else I can do about it at this point. From a medical standpoint he is pretty much stable. I will otherwise see im back at the end of the summer unless he has any problems in the interim, according to Dr. Pavlak.

Claimant's psychological problems are best summarized by the July 15, 1998 report of Christine A. Gray, Psy. D., wherein the doctor concludes as follows (CX 3 at 44):

To summarize, Mr. Campbell will be recommended for the following treatments:

1. 4-session Pain Management class.

2. Four individual pain management sessions focusing on relaxation training, biofeedback, and cognitive pain management skills.

Time Frames

Treatment will not continue beyond 6 sessions unless the patient is showing objective signs of active participation. It is anticipated that the above treatment will be completed in 8-10 sessions over a period of approximately 3 months, with the possibility of a few longer-term (primarily monthly) sessions to encourage or reinforce maintenance of gains. Each session note from session number 4 onwards (if not before #4) will discuss functioning in an explicit way.

In her July 28, 1998 followup report, Dr. Gray states as follows (CX 3 at 47):

Mr. Campbell returns for discussion of his screening questionnaires and treatment planning. He noted that he has seen the neurologist for an evaluation and the neurologist saw no indications for any new neurological problems. To be safe, the neurologist has scheduled an MRI but Mr. Campbell comments that "Dr. Vigna does not expect to find anything."

Physically, Mr. Campbell notes that he feels much, much better. He notes that the headaches are more manageable and he is feeling more rested.

The results of the screening questionnaires were discussed with

Mr. Campbell as were the treatment recommendations for involvement in the pain management group and individual pain management. Mr. Campbell was agreeable to this and was scheduled for the pain management class. He will also return for individual appointments.

According to Dr. Gray, Claimant attended and completed three of the four pain management classes and he "was an attentive and verbal participant who provided much feedback throughout the classes." (CX 3 at 48-50)

Claimant has also been evaluated and treated by Peter M. Filo, D.O., and the doctor's progress notes are in evidence as CX 4 at 51-58. The progress notes of Dr. Kristina Callis are in evidence as CX 2. Claimant's work capacities assessment took place on November 9, 1998 and that report is in evidence as CX 5 at 59-70 and Dr. John Pier, in his December 7, 1998 Comprehensive Medical Evaluation at the Employer's request, concluded as follows (CX 5 at 73-75):

CONCLUSIONS

Impression:

1. T12 compression fracture.
2. Multi-level Schmorl's nodes, possibly indicative of multi-level discogenic pain, less likely.
3. History of depressed mood without evidence on today's evaluation.

Discussion: Mr. Campbell states that his present difficulties are predominantly with sleep. He has attempted Amitriptyline. He stated to me that he was no longer on this medication. He has, to my knowledge, only attempted Amitriptyline and Paxil. These are the only medications I could find in the records I reviewed.

It may be worthwhile, and actually beneficial, to consider alternate sleeping medications. He may benefit from either a trial of Doxepin which has more muscarinic activity than Amitriptyline and therefore is slightly more sedating. He could also benefit from a true sleeper, such as Ambien.

Mr. Campbell appears to have a work capacity. He did perform in a functional capacity assessment at HealthSouth Rehabilitation

with the ARCON computerized testing program. Lumbar lift 50 pounds and cervical lift 40 pounds. He states that he was "laid up for an hour after this." This appeared to be slightly beyond his true capabilities given the level of pain he had following. His heart rate was noted to be significantly elevated throughout. Beginning heart rate was at 99 and ending heart rate 153. His perceived exertion was relatively high, indicative of some element of reconditioning.

Given the findings on the functional capacity evaluation, he can lift safely. He is unlikely to perform this level of lifting without pain. He may do better considering limiting his lifting to approximately 30 pounds, and in this way, avoid the pain flare that he had at this evaluation. This is not to state that he cannot perform higher levels safely. By safely, I mean that he is unlikely to worsen his condition, but may have increasing discomfort. Given this, he may be more appropriate to consider the lower weight level, specifically 30 to a maximum of 40 lumbar and 20-30 pounds cervical. I would not place restrictions on hours worked. This is again based on his diagnosis. Obviously, the longer he stays out, the harder it may be for him to go back to work. There did appear to be some stressors between him and his supervisors. It is much better to address these as they arise and continue to encourage him to address them within the employment setting rather than avoiding the employment altogether. I agree with Dr. Pavlak in his attempts at returning Mr. Campbell to work.

From a treatment standpoint, I do not see specific treatments that would change his outcome. At least from a diagnostic standpoint, I did not see tests that are required. His MRI reveals multi-level Schmorl's nodes. The most significant compression fracture was at T12.

It is possible that he has a facet syndrome, posterior to T12-L1. This can be confirmed by an intraarticular facet injection or a medial branch block. I am not sure that this will necessarily change his outcome, but may allow a specific diagnosis to be provided. Alternatively, his underlying pain generator may be his T12-L1 disk. I am not convinced that he requires fusion at this point, and therefore, would not encourage discography.

He has utilized infrequent analgesics. He presently uses Motrin which I feel is appropriate. He would like to avoid medications that alter his mood, and therefore, narcotics can be avoided.

Medications for sleep, specifically Doxepin, Trazondone, Ambien can be trialed. he also may benefit from a combination of tricyclic mixed with a muscle relaxant at night to assist with sleep. I usually recommend a tricyclic first, although he appears to have failed Amitriptyline. Doxepin is slightly more sedating, but not greatly so. If this fails, adding a muscle relaxant or switching to a medication such as Ambien may be necessary. He does not appear to be depressed at this time, and therefore, I did not see the need for antidepressant medication, specifically an SSRI.

Answers to Specific Questions

1. What are Mr. Campbell's diagnoses?

This is discussed above. The compression fracture at T12 appears to be related to his employment. The Schmorl's nodes at the other levels are not related to his employment. He also has a history of tension headaches. This appears to be more related to his present stressors than it is to the original injury. His fatigue appears to be related to his sleep disturbance. I could not identify other stressors in his life, and therefore, would have to relate his present pain syndrome to be the most likely etiology. Tension headaches, however, are multifactorial and I would not necessarily relate these to his present work injury. I would also not relate the need for his recent head MRI given that an acoustic neuroma would certainly not be work-related.

2. Recommended treatment plan:

The recommended treatment plan is to attempt to restore sleep. I have discussed this above. I would highly encourage a return to work. It appears that Dr. Pavlak was moving in this direction and I would encourage it at this point. He has completed pain management. He has completed attempts at medication management. There is very little from a therapy standpoint that would change his course. A conditioning program would be highly recommended given his level of reconditioning he showed on his functional capacity assessment. He may benefit from a short supervised course with an exercise physiologist. I would rapidly wean this to an independent program. If Mr. Campbell is motivated, he can certainly perform an exercise program independently.

3. Work capacity:

This is discussed above.

Hopefully, this analysis is helpful. I would be happy to review records and/or questions as they arise, according to the doctor.

Dr Pier states as follows in his March 13, 2000 report (EX 5 at 2-3):

IMPRESSION: Chronic low back pain status-post T12 compression fracture.

DISCUSSION: Mr. Campbell unfortunately continues with pain. Mr. Campbell does continue to describe mid line back pain. This is without significant change compared to his evaluation almost 15 months ago. He still describes pain between a 5-10 on a scale of 0-10. He has had a waxing and waning course. This is very consistent with his diagnosis of a previous compression fracture as well as multilevel degenerative changes/Shmorl's nodes in his lumbar spine. I have explained to him that he will have waxing and waning symptoms in the future.

Mr. Campbell does describe upper thoracic pain as well as thoracolumbar pain. He also had palpatory tenderness lower at L4-5. The lower pain is likely related to the degenerative and end plate changes at those segments.

Mr. Campbell is encouraged to continue with a therapeutic exercise program. I would highly encourage this be done either in a structured or independent basis. He has had extensive therapy in the past and having this done on an independent basis is certainly very reasonable. Gentle conditioning including aerobic conditioning would be encouraged. His aerobic capacity noted in his FCE done 15 months ago was poor. Hopefully this can be improved upon.

WORK CAPACITY: Mr. Campbell does maintain a work capacity. This would be in the light to light medium capacity. I believe this capacity is similar to the capacity I dictated 15 months ago. Lifting between 24 and 30 lbs. Occasional push/pull of 100 lbs., twist/bend would be occasional, and stooping would be occasional. Kneeling, crawling, and climbing would be minimal. This is all based on his diagnosis. I would recommend that he have the opportunity to get off his feet approximately five minutes every hour, but there is no significant restriction to sitting as long as he can change his positions, again every

hour.

No restrictions to repetitive use of the hands.

The work restrictions I have provided are not dissimilar to the work restrictions provided by Dr. Pavlak in October of 1999. They appear to be consistent with his work capacity over the last year to 18 months. Hopefully, a job can be found within these restrictions. Hopefully, Mr. Campbell will be willing to accept that position. I certainly feel that work within these capacities should be tolerated without significant difficulty or any damage done to his underlying condition.

PROGNOSIS: I would expect Mr. Campbell to have waxing and waning symptoms in the future. This is based on the underlying degenerative change. Unfortunately, he does not respond to significant therapeutic interventions. Hopefully, he will remain functional despite that, according to the doctor.

Claimant underwent physical therapy at the Physical Therapy Center from June 4, 1996 to August 2, 1996 and those records are in evidence as CX 11.

Dr. Todd A. Tritch is Claimant's family doctor and his treatment records are in evidence as CX 12. As noted above, Dr. Pavlak referred Claimant to Dr. Bernard P. Vigna, Jr., a neurologist, for further evaluation of Claimant's continuous headaches, dizziness and ringing in his ears, and that evaluation took place on July 20, 1998 (CX 13) and the doctor recommended "an MRI of the brain principally to rule out acoustic neuroma." (CX 13 at 144)

Claimant was also seen by Dr. Peter F. Morse, an optometrist, and the doctor concluded as follows in his September 22, 1997 report (CX 40 at 268):

Impression: At forty, Scott's examination appeared unremarkable with the exception of some mild presbyopia for which a reading correction was provided.

Melvyn Attfield, Ph.D., in his May 13, 1999 Behavioral Medicine Consultation, concluded as follows in his report to Employer's counsel (EX 2 at 16):

INFORMAL DIAGNOSTIC IMPRESSIONS

The SYMPTOM MAGNIFICATION SYNDROME STRUCTURED INTERVIEW (Matheson, 1991): This questionnaire is provided to assess for the presence or absence of effective strategies for "negotiating with symptoms," presence or absence of volitional control over the immediate environment, and possible abdication of control to symptoms. It is also designed to assess the possibility of magnification of functional limitations including an individual giving less than full effort on maximum performance tasks and demonstration or report of nonorganic signs and symptoms.

It is essential to realize the limitations of this particular test. The issue of symptom magnification does not discredit the individual's pain complaint, nor does it question the individual's honesty. It may, however, suggest a constellation of behaviors which have become emergent through medical social circumstances that are perpetuating an individual's perceived level of disability. This test should be used for constructive purposes to help identify treatment strategies.

Symptom magnification is not a psychiatric diagnosis.

Impressions: Presents with developing factors of symptom magnification syndrome by virtue of the fact that this gentleman is finding difficulty negotiating with pain behavior to the extent that he is unable to complete his normal daily vocational and avocational routine. It seems that the former is more impaired than the latter. He does maintain active involvement in domestic pursuits and notes moderate involvement in activities away from home, social activities and recreational activities. There is evidence of amplification of functional limitations, although the exact nature of these impairments, his perception and the type of coping strategies utilized cannot be clearly articulated because of noncompliance with psychometric assessment.

Dr. Attfield opined that "there appears to be a diagnosis of pain disorder which appears causally related to his current diagnosis," that "initially the condition appeared to have precipitated a period of distress" but that "the significant factors at this point in time appear non-work-related rather than work-related," that Claimant is "suffering from a pain disorder which is associated with psychological factors and a medical condition" but that "there are no current work injury psychological effect present," that there are no psychological problems that prevent his return to work and that Claimant

should make a "good faith effort" to complete all of his testing so that he might return to work. (EX 2)

Claimant has been out of work for various periods of time because of his multiple medical problems and his inability to return to work at his regular duties on a full-time basis. He has been unable to work from June 24, 1998 as the Employer was not able to find suitable alternate work within his restrictions. He and Dr. Pavlak discussed his possible return to work and while Claimant and the doctor agreed that Claimant would try that label plate job, the Employer has given that job to another worker. As of March 9, 1999 Dr. Pavlak released Claimant to return to work in the job as parking lot attendant, two hours per day, ten hours per week. He actually began that job on June 1, 1999 and his duties involve simply checking decals on vehicles to make sure that only authorized vehicles are parked in that parking lot. Claimant jots down the license plates of non-authorized vehicles and he turns in those numbers to his supervisor, Ken Cote, the Employer's Chief of Security. He has missed some work time because of flareups of back pain whenever the pain is "really intense" or "excruciating." Claimant receives some relief from the TENS unit he wears, as well as from the medication prescribed by Dr. Pavlak. He has asked the Employer for suitable production work but, as of January 14, 2000, Employer's counsel sent the following letter to Claimant's counsel (CX 19) (Emphasis added):

> **BIW has been unable to find work within Mr. Campbell's restrictions. I assume he is looking for work outside of BIW. If not, he should be. I would appreciate it if you would provide me with a copy of his work search to date.**

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a most credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**,

391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a

claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant’s employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff’d sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant’s employment is sufficient to rebut the

presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, chronic lumbar disc syndrome and his psychological problems, resulted from working conditions and/or his April 10, 1996 injury at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusziewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the

employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively established, and I so find and conclude, that Claimant sustained a work-related injury on April 10, 1996 at the shipyard, that the injury resulted in a compression fracture at the T12 level, as well as chronic headaches and dizziness and psychological problems as the natural and unavoidable consequences of such injury, and especially his inability to return to work full-time for the Employer at his former high-paying job, that Dr. Attfield, the Employer’s expert, does not rebut the connection between such headaches, dizziness and psychological problem, and Claimant's April 10, 1996 injury, that the Employer had timely notice of such injury and problems, has authorized certain medical care and treatment and has paid Claimant certain compensation benefits and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397

F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as an outside machinist. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir.

1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit probative and persuasive evidence as to the availability of suitable alternate employment, as further discussed below. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v.**

Newport News Shipbuilding and Dry Dock Company, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on March 11, 1999 and that he has been permanently and totally

disabled from March 12, 1999, according to the well-reasoned opinion of Dr. Pavlak, Claimant's treating physician. (CX 10 at 119)

With reference to Claimant's residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the

wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright this Employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law in the First Circuit that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his/her injury. That is exactly what Section 8(h) provides in its literal language. As noted above, Claimant has been unable to work since July 24, 1998. Initially, I note that Claimant is a highly-motivated individual who receives satisfaction in being gainfully employed. While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternate employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken herein and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294,

197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

Once claimant establishes that he is unable to do his usual work, he has established a **prima facie** case of total disability and the burden shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031, 1032, 14 BRBS 156, 165 (CRT) (5th Cir. 1981). In order to meet this burden, employer must show the availability of job opportunities within the geographical area in which he was injured or in which claimant resides, which he can perform given his age, education, work experience and physical restrictions, and for which he can compete and reasonably secure. **Turner**, **supra**; **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 667, 671, 18 BRBS 79, 83 (CRT) (5th Cir. 1986); **Mijangos v. Avondale Shipyard, Inc.**, 19 BRBS 165 (1986). A job provided by employer may constitute evidence of suitable alternate employment if the tasks performed are necessary to employer, **Peele v. Newport News Shipbuilding & Dry Dock**, 18 BRBS 224, 226 (1987), and if the job is available to claimant. **Wilson v. Dravo Corp.**, 22 BRBS 463, 465 (1989); **Beaulah v. Avis Rent-A-Car**, 19 BRBS 131, 133 (1986). Moreover, employer is not actually required to place claimant in alternate employment, and the fact that employer does not identify suitable alternate employment until the day of the hearing does not preclude a finding that employer has met its burden. **Turney v. Bethlehem Steel Corp.**, 17 BRBS 232, 236-237 n.7 (1985). Nonetheless, the Administrative Law Judge may reasonably conclude that an offer of a position within employer's control on the day of the hearing is not **bona fide**. **Diamond M Drilling Co. v. Marshall**, 577 F.2d 1003, 1007-9 n.5, 8 BRBS 658, 661 n.5 (5th Cir. 1979); **Jameson v. Marine Terminals**, 10 BRBS 194, 203 (1979).

Claimant cites the **Abbott** case as support for his ongoing entitlement to permanent total disability benefits herein despite the Employer’s Labor Market Surveys.

The Board has also held that a claimant may continue to receive total disability benefits even in those cases where an employer has established the availability of suitable alternate employment at a minimum wage level, but where claimant is precluded from working because he is undergoing vocational rehabilitation. **Abbott v. Louisiana Insurance Guaranty Association**, 27 BRBS 192, 201-203 (1993). In **Abbott**, the Board affirmed the remedy fashioned by Judge Ben H. Walley as "it comports with the fundamental policies underlying the statute and its humanitarian purposes. **Abbott**, **supra** at 203.

In the case at bar the Employer has offered the March 29, 2000 Labor Market Survey and Transferrable Skills Analysis of Peter Duchesneau, MPA, the Employer's Rehabilitation Specialist, wherein Mr. Duchesneau, speaking in rather general terms as to Claimant's transferrable skills (**see, e.g.**, page 3 of his report, that top paragraph at EX 8 at 3) reports that he has located six hundred positions "that are likely suitable" for Claimant, based upon his review of the **Maine Sunday Telegram** for a six month period, at "average earnings ... between $8.00 - $12.00/hr." Mr. Duchesneau then contacted thirty employers by telephone and "fifteen of these employer indicated either recent, current or anticipated openings," at salaries of from $8.00 to $10.00/hr." He then went to four of the sites to analyze the particular jobs as a customer service representative/cashier; as a warehouse position; a manufacturing position; and as a production worker at a dairy. The specific job duties are in the record at EX 8 at 6-13.

In Appendix B, the report lists a total of 625 positions, again in rather general terms, by simply referring to the employer and job title. Very few of those jobs have any salary information or any particulars as to the job duties. (EX 8 at 14-46)

Appendix C lists Recent Department of Labor/Job Service Job Postings by job title, location, salary (in most instances) and Job Order #. A total of 143 jobs are listed at pages 47-59 of EX 8.

Initially, I reject Appendix B and Appendix C because the record contains absolutely no information about the specific job duties and I am unable to determine whether or not those jobs are within Claimant's residual work capacity and his physical restrictions and whether he can physically do those jobs.

Claimant testified credibly that he has diligently looked for work from August 2, 1999 to April 11, 2000, that no one has offered him a job and that he is usually given various reasons for not hiring him; his job search is in evidence as CX 15 at 185-187. He has been accepted by the Bureau of Rehabilitation Service, Department of Labor, State of Maine, as being "eligible for Vocational Rehabilitation services" as of April 7, 2000 and he has been put into category 1, a person "with the most severe disabilities." (CX 15 at 187-A)

Claimant seeks benefits for his loss of wage-earning capacity from May 25, 1996 through June 24, 1998 and the alleged compensation due is delineated in the record at CX 16 at 188-190.

The parties deposed Mr. Duchesneau on May 22, 2000, the transcript of which testimony is in evidence as CX 20. Mr. Duchesneau was graduated from the University of Maine in 1995 with a Master's Degree in Public Administration, with a concentration in Environmental Policy, and, as part of his Master's thesis, he prepared "four separate studies, the North Woods Park, the Community Policing, the Spotted Owl and the Secondary Wood Products Industry." Mr. Duchesneau was employed by Concentra Managed Care from March, 1994 to February of 2000, and he now works for a company called Medical Case Management Group, "a similar agency to Concentra Managed Care" and which "assist(s) people in returning to work and coordinating medical and vocational services;" the company is owned by Quinton and Donna Besch. (CX 20 at 3-7)

Mr. Duchesneau was retained by the Employer in March of 2000, at which time he was asked "to do a labor market survey," the "parameters" of which were discussed, and he was "sent the complete file with the medical reports." Mr. Duchesneau, after reviewing the file to determine Claimant's "work history, education, his work capacity from the medical records, assessed the labor market in the survey area, given the individual's limitations and transferrable skills and the surveyed area, which would be ... a 45 minute commute from his home ... in Pownal, Maine." (CX 20 at 8-15)

In response to very intense cross-examination by Claimant's counsel, Mr. Duchesneau admitted that he did not contact this Employer looking for suitable alternate employment even though the Employer is the largest private employer in the State of Maine and even though Claimant has worked for the Employer for

over twenty (20) years, apparently because he "was not asked to include BIW as part of the assessment of employment in the area." (CX 20 at 16-17)

Mr. Duchesneau then described the methodology that he used in locating and identifying for the Employer jobs that he believed were suitable for the Claimant as within his work restrictions (CX 20 at 18-42) and Mr. Duchesneau's opinions fluctuated and wavered and he was not forthright in supporting the general opinions he expressed in his written report. (EX 8)[2]

According to the Employer's brief (EX 11 at 4), "The Labor Market Survey presented by the employer sets forth numerous job opportunities, many of which undoubtedly are within the employee's limited restrictions. The four jobs outlined above specifically identify jobs that appear to physically be within the employee's restrictions, had current openings available at the time of the study in March of 2000, and set forth specific salary ranges. This is clearly evidence of suitable alternative employment available to the claimant and supports a finding of partial, rather than total, disability.

" The employee's work search evidence failed to counteract the effects of the labor market evidence. The work search documentation was extremely limited, indicating only five employer contacts in August of 1999, and no contacts between 8/10/99 and 12/9/99 (when the claimant inquired at BIW for a job opening). Subsequently, the Claimant made only one employer contact outside of BIW (Fairchild Semiconductor 2/29/00), prior to contacting the State of Maine Department of Labor Vocational Rehabilitation Program."

Initially, I note that there is no legal obligation on the Claimant to seek alternate employment when he cannot return to work at his former shipyard employment **until such time as the Employer satisfies its burden to establish the availability of suitable alternate employment within his work/physical limitations.** In this regard, **see Palombo, supra**, 937 F.2d 70, 25 BRBS 1 (CRT)(2nd Cir. 1991). As noted above, the Employer did

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[2]Deposition Exhibit 2, an updated letter from Mr. Duchesneau to Employer's counsel, is admitted into evidence as it is relevant and material herein and as Claimant's objections really go to the weight to be accorded to those opinions.

not retain Mr. Duchesneau until sometime in March of 2000, shortly before the April 18, 2000 formal hearing herein.

Even after returning to work in Employer's parking lot, Claimant has looked diligently for alternate work at the yard, and he testified credibly regarding his effort to obtain jobs which would be full-time and consistent with his physical limitations. He has also looked for work outside the shipyard. His work search is in the record, and he has become qualified for vocational rehabilitation on his own initiative under the State's rehabilitation program. (CX 15)

Ironically, even while Claimant was working 2 hours per day as a parking lot attendant, he was informed by the Employer in a letter, dated January 14, 2000, that it has been unable to find work for him. (CX 19)

Thus, as of that date, all were in agreement that the Employer was able to provide for Claimant only that job as a parking lot attendant.

As noted above, the Employer has offered the Labor Market Survey (EX 8) and testimony of Peter Duchesneau (CX 20) in support of its position that Claimant is only partially disabled, but the Employer now posits that Claimant "would be entitled to temporary total benefits during said (state rehabilitation) program ... (t)o the extent the Claimant is unable to continue with this part-time employment during vocational rehabilitation." (EX 11 at 1-2)

However, I cannot accept Mr. Duchesneau as an expert witness on Claimant's transferrable skills or his residual work capacity for the following reasons:

Mr. Duchesneau presents no qualifications which would allow him to testify as an expert in this case. He has no training in vocational rehabilitation or placement. He received his Master's Degree from University of Maine in Public Administration, and he has an undergraduate degree from Rutgers's University in Sociology. His research has been in the area of environmental studies and community policing, and he has referenced no educational background or special training which would qualify him to evaluate the labor market, or to evaluate the particular physical demands of any job. He worked as an insurance employer/consultant during his graduate studies for an organization called Concentra Care Management, but even his work

for that organization did not involve work in the Bath/Brunswick/Portland area.

On examination during his deposition he testified that most of his work has been in the Bangor area, and that basically included Millinocket and Machias down to around Augusta. He had never met Claimant and he has no idea what a machinist does at the shipyard.[3] His assumption that Claimant had supervisory skills is not supported by the record. (CX 20 at 11) He could not recall why he thought Claimant had supervisory skills. He testified that he had no real knowledge of what Claimant did at work, and he testified that he had never spoken with him, nor had he ever interviewed Angela Moustrouphis, the highly competent adjuster who referred the case to him, or anyone else at Bath Iron Works.

Basically, Mr. Duchesneau looked at the **Portland Sunday Telegram** from September 1999 through February of 2000. When asked about specific jobs, it was clear that the most he could say about even the jobs listed was that they were possible jobs for Claimant to explore. He did not develop detailed descriptions of any of these jobs, and he had no understanding of the specific requirements of the jobs. He testified further that he did not know what the term “heavy lifting” meant. He could not tell whether a prospective employer who denied a requirement for heavy lifting was referring to lifting greater than 25 pounds. (CX 20 at 22-23) When pressed as to what his understanding of heavy work might be, he withdrew from the deposition, refused any further questions and abruptly left the room. (CX 20 at 24-25) After Mr. Hochadel spoke with the deponent during a break, he returned for additional questioning. Mr. Duchesneau, when asked about Claimant’s potential skills as a jewelry sales person (given his working his entire adult life in a heavy industry), surmised that he was sure “he has some customer skills or social skills from working with people at Bath Iron Works.”

Mr. Duchesneau likewise failed to address the issue of how much these jobs would pay in 1996 dollars. He made a cursory attempt at best and admitted that he never attempted to determine 1996 wages for specific jobs. He had vague estimates

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[3]Perhaps a tour of the shipyard may be in order for Mr. Duchesneau as this Judge finds such view to be most beneficial to put a claim and particular jobs in proper perspective.

in the $5-7 dollars per hour range for example. (CX 20 at 31) Mr. Duchesneau admitted that the salary re-calculations were really numeric assumptions rather than specific positions in the labor market survey and he has offered nothing in terms of what the jobs listed in his labor market survey would actually pay in 1996 dollars. Furthermore, his labor market survey lacks fundamental validity based upon his lack of qualifications and his lack of understanding of the particulars of Claimant and his employment background, as well as Mr. Duchesneau's lack of understanding of the labor market in the Bath-Brunswick area having worked only in the Northern Maine (Bangor-Millinocket-Machias) area.

I note that the Employer's brief has provided as Attachments A and B its calculations as to the adjusted salaries for those jobs as of April 10, 1996 by using the so-called deflation factors, a procedure approved by the Benefits Review Board in **Richardson v. General Dynamics Corp.**, 23 BRBS 327 (1990). (EX 11) **See also Richardson v. General Dynamics Corp.**, 19 BRBS 48 (1986).

As indicated above, the Employer has offered a Labor Market Survey (EX 8) in an attempt to show the availability of work for Claimant as a sales representative and a washer/feeder and as a cashier/stock person at a gas station/convenience store, as a warehouse assistant for a tree trimming company, operating equipment at a dairy, and most other jobs are simply listed by title. I cannot accept the results of that very superficial survey which apparently consisted of the counsellor making a number of telephone calls to prospective employers. While the report refers to personal contacts with area employers, I simply cannot conclude, with any degree of certainty, which prospective employers were contacted by telephone and which job sites, if any, were personally visited to observe the working conditions to ascertain whether that work is within the doctor's restrictions and whether Claimant can physically or intellectually do that work.

It is well-settled that the Employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondents must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16

BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

The Labor Market Survey and the addendum (EX 8) cannot be relied upon by this Administrative Law Judge for the more basic reason that there is a complete absence of any information about the specific nature of the duties of the jobs identified by Mr. Duchesneau, and whether such work is within the doctor's physical restrictions. (EX 8) Thus, this Administrative Law Judge has absolutely no idea as to what are the duties of those jobs at the firms identified by Mr. Duchesneau.

I am cognizant of the fact that the controlling law is somewhat different on the employer's burden in the territory of the First Circuit when faced with a claim for permanent total disability benefits. In **Air America, Inc. v. Director, OWCP**, 597 F.2d 773, 10 BRBS 490 (1st Cir. 1978), the United States Court of Appeals for the First Circuit held that it will not impose upon the employer the burden of proving the existence of actual available jobs when it is "obvious" that there are available jobs that someone of Claimant's age, education and experience could do. The Court held that, when the employee's impairment only affects a specialized skill necessary for his pre-injury job, the severity of the employer's burden had to be lowered to meet the reality of the situation. In **Air America**, the Court held that the testimony of an educated pilot, who could no longer fly, that he received vague job offers, established that he was not permanently disabled. **Air America**, 597 F.2d at 778, 780, 108 BRBS at 511-512, 514. Likewise, a young intelligent man was held to be not unemployable in **Argonaut Insurance Co. v. Director, OWCP**, 646 F.2d 710, 13 BRBS 297 (1st Cir. 1981).

As noted above, the parties are in disagreement as to Claimant's post-injury wage-earning capacity. Thus, in my judgment, **Air America**, **supra**, and **Argonaut Insurance Co.**, **supra**, are distinguishable herein as involving an employee who has an entire work history as being that of heavy manual labor.

As noted, **Air America** deals with a highly intelligent airplane pilot who no longer could fly planes but who certainly had transferrable skills and a residual work capacity to perform several alternate jobs. Such is not the case here. Claimant has a high school education but his entire employment history has been involved with physically-demanding manual labor. All agree that he cannot return to work at his former job at the shipyard and the State of Maine has accepted Claimant for vocational rehabilitation, Class I, because of his severe disabilities.

Accordingly, I find and conclude that the **Abbott** case applies herein because Claimant cannot return to his former high-paying job, that the parking lot attendant job provided to Claimant is actually "sheltered employment" for a first class mechanic, being paid wages slightly above minimum wages, that the four jobs identified by Mr. Duchesneau, assuming, **arguendo**, that such jobs constitute suitable alternate for the Claimant, pay slightly above minimum wage, if the deflation factors are correct, that Claimant must be retrained for other forms of endeavor as quickly as possible so that he can return to work in gainful employment at wages in close proximity to his regular wages at the shipyard as of the day of his injury and that this Employer may be liable, in a Section 22 proceeding, for any loss of wage-earning capacity experienced by the Claimant **in futuro**.

Accordingly, I find and conclude that Claimant is entitled to an award of permanent total disability from the date of his maximum medical improvement and that such benefits shall continue until he is retrained for other employment and commenced such employment. Any change in Claimant's benefit level must be pursuant to a Section 22 proceeding and an **ORDER** from this Court in the absence of an agreement by and between the parties to resolve all issues pursuant to Section 8(i).

Accordingly, in view of the foregoing, Claimant is entitled to an award of temporary total disability from April 10, 1996 through May 24, 1996 and from June 25, 1998 through March 11, 1999, as well as an award of permanent total disability from March 12, 199 to the present and continuing until further **ORDER** of this Court, based upon his average weekly wage of $746.87.

Moreover, Claimant is entitled to an award of temporary partial disability benefits from May 25, 1996 through June 24, 1998, based upon the loss of wage-earning capacity reflected in

the spread sheet prepared by Claimant and which is in evidence as CX 16. That spread sheet reflects that Claimant's lost earnings between May 25, 1996 and June 24, 1998 total $19,888.68 and that, pursuant to Sections 8(e) and 8(h), Claimant is entitled to the amount of $13,259.12 as temporary partial disability benefits during that closed period of time as I find and conclude that those wages are representative of Claimant's wage-earning capacity between those dates.

If reviewing authorities should hold that **Abbott** a Fifth Circuit case, does not apply in the First Circuit, then I would also find and conclude that the job of parking lot attendant, two hours per day, five days per week (a schedule Claimant has often failed to keep because of his chronic lumbar pain) is "make work" or "sheltered employment." In this regard, I agree completely with my distinguished colleague, District Court Judge Robert D. Kaplan, as he found that same job to be "make work." **See** CX 23. **See also CNA Insurance v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991), a matter over which I presided and one which involved, **inter alia**, the issue of "sheltered employment."

Accordingly, in view of the foregoing, I cannot accept the results of the Labor Market Survey because, without the required information about each job, I simply am unable to determine whether or not any of those jobs constitutes, as a matter of fact or law, **suitable** alternate employment or **realistic** job opportunities. In this regard, **see Armand v. American Marine Corporation**, 21 BRBS 305, 311, 312 (1988); **Horton v. General Dynamics Corp.**, 20 BRBS 99 (1987). **Armand** and **Horton** are significant pronouncements by the Board on this important issue.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979);

Santos v. General Dynamics Corp., 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer, although controverting Claimant's entitlement to benefits on April 11, 1996, nevertheless has accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits from the day of the accident to the present time and continuing and timely controverted his entitlement to additional benefits by a document dated April 13, 1997. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16

BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related back injury, as well as for his psychological problems, as further discussed below. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on the same day and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

As I have already concluded that Claimant’s psychological problems, also constitute a work-related injury as the natural sequella or the nature and unavoidable consequences of his April 10, 1996 shipyard accident, the Employer is responsible for such reasonable, necessary and appropriate medical care and treatment, as well as psychological counseling, related to the diagnosis, evaluation and treatment for his lumbar and psychological problems, subject to the provisions of Section 7 of the Act.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed a fee application on August 4, 2000 (CX 23), concerning services rendered and costs incurred in representing Claimant between August 5, 1996 and August 2, 2000. Attorney James W. Case seeks a fee of $14,139.00 (including expenses) based on 66.30 hours of attorney time at $100.00, $150.00 and $195.00 per hour and 32.8 hours of paralegal time at $55.00, $45.00 and $65.00 per hour.

The Employer has objected to the requested attorney's fee as excessive in view of the benefits obtained, the hourly rates charged and the time periods identified in the petition. (EX

12) Claimant’s counsel has filed a spirited defense of his fee petition. (CX 24)

In the interests of judicial efficiency, I shall consider the entire fee petition as the Employer does not object to any of the specific services itemized. While Attorney Case has offered to withdraw his fee petition for services rendered prior to the informal conference (CX 24), I shall consider the entire fee as Employer’s counsel does not object to any of the services rendered or costs incurred.

The Employer objected to the hourly rate and proposed an hourly rate of $185.00 for Attorney Case and other members of his firm. The hourly rate suggested by the Employer is certainly not realistic at this time, especially in contingent litigation where the attorney's fee is dependent upon successful prosecution. Such a fee if adopted in these claims, would quickly diminish the quality of legal representation. This matter has bee successfully prosecuted by Claimant attorney with a most reasonable number of hours and the fee petition, as revised herein, is approved.

While the Employer’s counsel refers to Attorney Case’s “former rate of $145.00" as the norm, the prevailing rate for services rendered by an attorney with the expertise regularly manifested by Attorney Case has been $195.00 since at least July 1, 1999. Thus, all of the hours approved for Attorney Case shall be at the current prevailing rates, rates which may increase in 2001, if warranted by inflationary factors.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney in this complex and vigorously defended claim, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $14,139.73 (including expenses of $935.73) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition. Claimant is also awarded the amount of $200.00 for the spirited defense of his fee petition. (CX 25)

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for his temporary total disability from April 10, 1996 through May 24, 1996, and from June 25, 1998 through March 11, 1999, based upon an average weekly wage of $746.87, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on March 12, 1999 the Employer shall also pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $746.87, such compensation to be computed in accordance with Section 8(a) of the Act.

3. The Employer shall also pay to Claimant compensation for his temporary partial disability, based upon the difference between his average weekly wage at the time of the injury, $746.87, and his wage-earning capacity between May 25, 1996 and June 24, 1998 and such compensation totals $13,259.12 for that time period, pursuant to the uncontradicted evidence submitted by the Claimant (CX 16), as provided by Sections 8(e) and 8(h) of the Act.

4. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his April 10, 1996 injury. The Employer is also entitled to a credit for the wages paid Claimant by the Employer as a parking lot attendant and such wages are reflected in the wage statement attached to Claimant’s brief. To deny such credit to the Employer would result in a double recovery by Claimant and would violate the spirit of Section 3(e) of the Act. Such gross wages total $8,352.58 between August 8, 1999 and July 30, 2000. Additional wages, if any, should be submitted to the District Director for her consideration and appropriate credit therefor.

5. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

6. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related lumbar and psychological problems referenced herein may require, subject to the provisions of Section 7 of the Act.

7. The Employer shall pay to Claimant's attorney, James W. Case, the sum of $14,339.73 (including expenses) as a reasonable fee for representing Claimant herein August 5, 1996 and August 16, 2000.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:jl